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IN THE

Supreme Court of the United States

..... Term, 1972

No. 72-110

EAGLE STAR INSURANCE GROUP, Garnishee,
Petitioner,

v.

CARL N. WALKER, Administrator of the Estate of Norbert N. Walker, deceased,
and
THE TILLEY LAMP COMPANY, LIMITED, a corporation;
THE TILLEY LAMP CO. (U. S. A.) LTD., a corporation;
and A. W. THACKER, INC., a corporation,
Respondents.

..... Term, 1972

No. .....

EAGLE STAR INSURANCE GROUP, Garnishee,
Petitioner,

v.

MARY C. FLAVIN, Administratrix of the Estate of Wilbert F. Gries, deceased,
and
THE TILLEY LAMP COMPANY, LIMITED, a corporation;
THE TILLEY LAMP CO. (U. S. A.) LTD., a corporation;
and A. W. THACKER, INC., a corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GEORGE M. WEIS,
WEIS & WEIS,
920 Grant Building,
Pittsburgh, Pennsylvania 15219,
Attorneys for Petitioner.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881-7463.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the Court of Appeals for the Third Circuit which affirmed the judgment of the District Court.

Opinions Below

The opinion of the Court of Appeals, presently unreported, appears in the index hereto. The opinion written by the United States District Court for the Western District of Pennsylvania is presently unreported and appears in the appendix hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on July 6, 1972.

Jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented

1. Did the lower court abuse its discretion in refusing to vacate a default judgment when the default was caused by excusable neglect, a motion to vacate was promptly and diligently filed, and meritorious legal defenses were set forth in the motion to vacate?

2. Is it a denial of due process under the Fourteenth Amendment to the United States Constitution for a United States District Court to refuse to give effect to the terms of an insurance policy issued by the Eagle Star Insurance Company, a United Kingdom corporation to the Tilley Lamp Company, a United Kingdom corporation, when the insurance policy was executed in the United Kingdom, paid for in the United Kingdom and to be performed in the United Kingdom?

3. Did the lower court abuse its discretion in rejecting the legal defense of satisfaction and settlement?

Statement of the Case

The Tilley Lamp Company, Ltd., a North Irish corporation, is a manufacturer of various products, among which is a portable kerosene heater. Its office and plant are located at Dunmurry, Belfast, Ireland. In addition to sales in the United Kingdom, Tilley exports these products to the United States and elsewhere. In their Complaints, the Administrators of the Estates of Norbert N. Walker and Wilbert F. Gries allege that a heater was sold to Gries by D. Lux Sales, Incorporated of Pittsburgh, Pennsylvania. The heater was manufactured and designed by Tilley and according to the plaintiffs was defectively designed and was unreasonably dangerous to the user or consumer. The plaintiffs further allege in their Complaints that on or about October 1, 1967 the plaintiffs' decedents died as a result of asphyxiation due to carbon monoxide poisoning caused by the Tilley kerosene heater which was in use in a camping trailer which the plaintiffs' decedents were occupying.

The plaintiffs then filed the present Civil actions against Tilley Lamp Company, Tilley Lamp (U. S. A.), and A. W. Thacker on September 18, 1968. The suits against Tilley Lamp (U. S. A.) and A. W. Thacker were subsequently dismissed and the plaintiffs proceeded on a default against Tilley Lamp Company, Ltd. alone. Jurisdiction of the lower court was based on diversity of citizenship and the allegations that the amounts in controversy were in excess of $10,000.00, exclusive of interest and costs. Judgments were entered June 30, 1969 against Tilley Lamp Company, Ltd. in the sum of $25,099.00 in the Gries cases and $112,362.43 in the Walker cases.

The plaintiffs also filed separate Civil actions against D. Lux Sales, Inc., the retailer of the lamp in question

alleging a sale of a lamp which was defectively designed and was unreasonably dangerous to the user or consumer. Before the matter came on for trial, the plaintiffs settled both cases with the insurance carrier for D. Lux Sales, Inc. When the settlement was made in March of 1971, the plaintiffs released D. Lux Sales under agreements which have been incorporated into this record (R. 154a) (R. 253a).

The plaintiffs then commenced the garnishment action against the Eagle Star Insurance Company and also the Sun Insurance Company, both United Kingdom corporations, by serving interrogatories in attachment on the Insurance Commissioner of the Commonwealth of Pennsylvania on April 22, 1971. Four days later, on April 26, 1971, Eagle Star wrote to plaintiffs' attorney from its office in New York and advised him that they were unable to identify the matter referred to in the Writ of Execution that had been served upon it (Exhibit "D" R. 248a). On April 29, 1971, plaintiffs' attorney wrote to Eagle Star's New York office and referred them to answers to interrogatories that had been filed in an unrelated case in the Middle District of Florida. On about May 13, 1971 the Eagle Star referred this matter to the present counsel of record. Due to an oversight, an extension of time was not obtained from the Court to answer the interrogatories. On May 27, 1971, the Sun Insurance Company was granted an extension in which to answer the interrogatories directed to it. On April 30, 1971 the defendant, Tilley Lamp Company, Ltd., wrote from Northern Ireland to Eagle Star's agent in Shrewsbury, England advising that they had been notified by D. Lux of Pittsburgh that the lawsuit brought against Tilley Lamp Company and D. Lux Sales was settled out of court by the insurance carrier for D. Lux Sales (Exhibit "G" R. 250a). On or about May 6, 1971

Eagle Star in London received notice of the settlement (Exhibit "F" R. 250a). On June 4, 1971, the plaintiffs defaulted the Eagle Star Insurance Company. On June 10, 1971, counsel for Eagle Star learned of the default and on that same date filed a motion to vacate the default judgment. An amendment to that motion to vacate was filed on June 15, 1971 and had attached thereto proposed answers to the interrogatories in attachment. In its proposed answers to interrogatories, Eagle Star admitted that there was in existence an insurance contract between it and Tilley Lamp Company that had been made in the United Kingdom, issued in the United Kingdom and the premium paid, in the United Kingdom, but denied that it applied to this particular case for several valid reasons. The matter came on for hearing before United States District Judge Sorg and the garnishee's motion to vacate the default judgments was denied. Garnishee, Eagle Star Insurance Group, appealed to the Third Circuit Court of Appeals which affirmed the judgment of the District Court in a *per curiam* opinion.

Reasons for Granting the Writ

Eagle Star Insurance Company seeks to set aside this default judgment under Federal Rules of Civil Procedure 55 (c) and Rule 60 (b). In construing these Rules, the Federal Courts are of the opinion that they are to liberally interpreted so as to provide trial on the merits wherever possible. *Tolson v. Hodge,* 441 F. 2d 123 (1969); *Tozer v. Charles A. Kraus Milling Co.,* 181 F. 2d 242 (1951). The cases generally laid down three criteria: (1) excusable neglect; (2) a prompt and diligent effort to remove the default; and (3) the assertion in the motion to vacate of meritorious defenses.

The lower court, in failing to apply the provisions of the insurance policy in question, violated the mandate of *Home Insurance Co. v. Dick*, 281 U. S. 397, 74 L. ed. 926, 50 Sup. Ct. 388.

Where one secures a judgment in a civil action for personal injuries and then garnishes the casualty insurance company that insures the defendant, the rights of the garnishor against the garnishee rise no higher than those of the defendant in the personal injury action and the garnishee's liability is measured as though the defendant itself had brought an action to recover on its policy. *Antone v. New Amsterdam Casualty Co.*, 1939, 335 Pa. 134. See also, *Cameron v. Burger*, 336 Pa. 229, 7 A. 2d 293, and *In Re: Boylan*, 69 Fed. Supp. 105, affd. 157 F. 2d 518.

In the present cases, the plaintiffs are subject to all of the defenses that the Eagle Star Insurance Company has against the Tilley Lamp Company. One of those defenses is that the policy of insurance did not cover the plaintiff's claim since it was not brought in a United Kingdom Court. Memorandum No. 2 in the insurance policy running from Eagle Star to Tilley provides:

> "It is hereby understood and agreed notwithstanding anything herein contained to the contrary, that the indemnity provided by this policy is extended to apply to the sale overseas of products manufactured and/or sold by the insured.
>
> Provided always that:—
>
> (b) All claims arising by reason of this extension shall be dealt with within the jurisdiction of the United Kingdom Courts only."

The lower court fails to recognize the fact that the policy of insurance in this case was a foreign contract of insurance made in the United Kingdom between two citizens of the

United Kingdom. The policy was issued, delivered and paid for in the United Kingdom. This is not the case of a foreign insurance company entering into a contract with a citizen of Pennsylvania or issuing a policy of insurance to a citizen of Pennsylvania or accepting payment for a policy by a citizen of Pennsylvania. The policy in question, therefore, does not come under the provisions of the Act of 1921, May 7, 1921, of the Commonwealth of Pennsylvania P. L. 682, Article III, Sec. 301, 40 P. S. Sec. 421, "which deals with the requisites for foreign insurance companies to do business in the State, and the Act of 1921, May 17, P. L. 789, Article II, Sec. 210, as amended, 40 P. S. Sec. 48, relating to service of process upon the Insurance Commissioner", as is set forth in the Opinion of the court below. The lower court by applying the above mentioned statutory law of the State of Pennsylvania to this foreign contract has enlarged its terms and thus has violated the due process clause of the Fourteenth Amendment.

The situation before this Court is very similar to that contained in *Home Insurance Co. v. Dick, supra.* In that case, a contract had been executed in Mexico insuring a boat against fire loss and the risk had been reinsured by New York corporations which were brought into the suit by garnishment. The policy contained a clause requiring suit to be instituted within one year after loss. This clause was valid by the Mexican Commercial Code. Texas, which was the forum and place of residence of an assignee of the policy, had a statute which prohibited stipulations fixing time of suit at less than two years and declared: "And no stipulation, contract, or agreement for any shorter limitation in which to sue shall ever be valid in this state." This statute was applied by the Texas courts but the decision was reserved by the Supreme Court of the United States as violating the due process clause of the Fourteenth Amendment.

In the case of *Lauritzen v. Larsen*, 345 U. S. 571 (1953), the Supreme Court reversed the lower court by applying the Jones Act in a conflicts of law situation. In that case a Danish seaman who was temporarily in New York joined the crew of a Danish vessel. He signed a contract which in essence provided that if he was injured he would be bound by Danish law on the subject. While the ship was in Havana, he was injured. He then sued the ship's owner in the Federal District Court in New York for damages under the Jones Act. The defendant did business within the State of New York. The lower court held the Jones Act was applicable. The Supreme Court in reversing the lower court stated at pp. 590, 591:

> "We have held it a denial of due process of law when a state of the Union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state. *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143; *Home Insurance Co. v. Dick*, 281 U. S. 397. The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum."

The Court also refused to accept the terms of the insurance policy therein that they excluded a design defect when there was, in fact, a finding in the original action of design defect.

The plaintiffs filed a wrongful death and survival action against D. Lux Sales, Inc. as a result of the same accident giving rise to the suits against Tilley Lamp Company, Ltd. These suits were then settled and the plaintiffs entered into an agreement with D. Lux Sales, Inc. and their insurer providing that in consideration of the payment of the settlement, Carl N. Walker ". . . agrees to release, remise, quick claim, settle and forever discharge the said D. Lux

Sales, Inc. from any and all claims, actions and demands arising by virtue of the decease of Norbert N. Walker on or about October 1, 1967."

The common law rule in Pennsylvania is that the release of one tort-feasor is a release of all tort-feasors in all cases even though a release reserved the right against another. The rule applied whether the liability of the tort-feasors was joint, several or successive. *Thompson v. Fox,* 326 Pa. 209, 92 A. 107 (1937); *Smith v. Fenner,* 99 Pa. 633, 161 A. 2d 150 (1960); see also, *Brown v. City of Pittsburgh,* 409 Pa. 357, 186 A. 2d 399 (1962).

The Court set forth the rule in *Thompson v. Fox, supra,* at pages 212 and 213 as follows:

> "For the same injury, however, an injured party can have but one satisfaction and the receipt of such satisfaction, either as payment of a judgment recovered or consideration for a release executed by him, from a person liable for such injury, necessarily works a release of all others liable for the same injury and prevents any further proceeding against them: *Peterson v. Wiggins,* 230 Pa. 631; *Smith v. Roydhouse, Arey & Co.,* 244 Pa. 474; *Mason v. Lavine,* 302 Pa. 472. This is true even though it was intended, or the release expressly stipulated, that the other wrongdoers should not thereby be released: *Seither v. Philadelphia Traction Co.,* 125 Pa. 397; *Williams v. LeBar,* 14 L. Pa. 149. Nor is it material whether the tort-feasors involved committed a joint tort or concurrent or successive torts, because the principle which underlies the rule is that the injured person is given a legal remedy only to obtain compensation for the damage done to him, and when that compensation has been received from any of the wrongdoers, his right to further remedy is at an end."

The only variation on this rule since the ruling in *Thompson v. Fox, supra,* is the passage of the Uniform Contribution Among Tort-Feasors Act in the State of Pennsylvania.

The Act provides an exception to the common law rule only in the case of joint tort-feasors. In the present case, Tilley Lamp is a manufacturer who would be held primarily liable and D. Lux would be a dealer in a position of secondary liability whether the plaintiff recovers on a theory of negligence in manufacture and/or design or strict liability under Section 402A of the Restatement of Torts 2d, *Greco v. Bucciconi Engineering*, 407 F. 2d 87 (1969) 3 Cir.; *Burbage v. Boiler Engineering & Supply Co.*, 433 Pa. 319, 249 A. 2d 563 (1969); *Builders Supply Co. v. McCabe*, 366 Pa. 322, 77 A. 2d 368 (1951).

In the present case, therefore, the plaintiff has received satisfaction, released all tort-feasors and is, therefore, barred from asserting any claim against Eagle Star Insurance Company as garnishee since his claim against Tilley Lamp Company is barred.

Conclusion

For these reasons, it is respectfully submitted that a writ of certiorari should be issued to review the judgment of the Court of Appeals that the default should not be opened

Respectfully submitted,

GEORGE M. WEIS,
WEIS & WEIS,
920 Grant Building,
Pittsburgh, Pennsylvania 15219,
Attorney for Petitioner

Opinion of the Court

(Filed July 6, 1972.)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1752

CARL N. WALKER, Administrator of the Estate of NORBERT N. WALKER, Deceased,

v.

THE TILLEY LAMP COMPANY, LIMITED, a corporation; THE TILLEY LAMP CO. (U. S. A.) LTD., a corporation; and A. W. THACKER, INC., a corporation.

APPEAL OF EAGLE STAR INSURANCE GROUP, GARNISHEE

No. 71-1753

MARY C. FLAVIN, Administratrix of the Estate of WILBERT F. GRIES, Deceased,

v.

THE TILLEY LAMP COMPANY, LIMITED, a corporation; THE TILLEY LAMP CO. (U. S. A.) LTD., a corporation; and A. W. THACKER, INC., a corporation.

APPEAL OF EAGLE STAR INSURANCE GROUP, GARNISHEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued June 9, 1972.

Before: Hastie, Gibbons and M. Rosenn, Circuit Judges.

PER CURIAM:

This appeal challenges as an abuse of discretion the refusal of the trial judge to vacate a default entered against a garnishee as a result of its failure for 43 days to answer Interrogatories in Attachment despite the requirement of law that answer be filed within twenty days.

Rule 55(c), Federal Rules of Civil Procedure, under which appellant sought relief, authorizes a District Court "[f]or good cause shown . . . [to] set aside entry of a default". Moreover, as the court below observed in this case, trial of the merits of a claim is preferable to disposition by default. However, on the present record we cannot say that the District Court acted arbitrarily or unfairly in refusing to vacate the default.

The judgment entered pursuant to default will be affirmed.

To the Clerk:

Please file the foregoing opinion.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1752

CARL N. WALKER, Administrator of the Estate of NORBERT N. WALKER, Deceased,

vs.

THE TILLEY LAMP COMPANY, LIMITED a corporation, THE TILLEY LAMP CO. (U. S. A.) LTD., a corporation, and A. W. THACKER COMPANY, INC., a corporation,

EAGLE STAR INSURANCE GROUP, garnishee,
Appellant.

(D. C. Misc. No. 5077)

No. 71-1753

MARY C. FLAVIN, Administratrix of the Estate of WILBERT F. GRIES, Deceased,

vs.

THE TILLEY LAMP COMPANY, LIMITED, a corporation, THE TILLEY LAMP CO. (U. S. A.) LTD., a corporation and A. W. THACKER COMPANY, INC., a corporation,

EAGLE STAR INSURANCE GROUP, garnishee,
Appellant

(D. C. Misc. No. 5078)

ON APPEALS FROM THE UNITED DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: Hastie, Gibbons and Rosenn, Circuit Judges

Judgment

These causes came on to be heard on the records from the United States District Court for the Western District of Pennsylvania and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court filed July 4, 1971, be, and the same are hereby affirmed, with costs taxed against appellant.

ATTEST:

THOMAS P. QUINN,
Clerk

July 6, 1972.

Opinion of the Court Below

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CARL N. WALKER, Administrator of the Estate of NORBERT N. WALKER, Deceased,

Plaintiff,

VS.

THE TILLEY LAMP COMPANY, LIMITED, a corporation; THE TILLEY LAMP CO. (U. S. A.) LTD., a corporation; and A. W. THACKER COMPANY, INC., a corporation,

Defendants

Misc. No. 5077

(Civil No. 68-1084)

ORDER.

AND Now, to-wit, this 8th day of July, 1971, this matter having come before the court upon motion of garnishee, Eagle Star Insurance Co., Ltd. (Eagle Star), to vacate a default judgment entered for failure of Eagle Star to answer Interrogatories in Attachment, and after consideration of extensive arguments and briefs of counsel as well as a review of the record at Civil Action No. 68-1084, the court finds the following:

Opinion of the Court Below.

Norbert N. Walker, plaintiff's decedent herein, and Wilbert F. Gries, plaintiff's decedent in a companion case at Misc. No. 5078 (Civil Action No. 68-1085) died October 1, 1967, in McKean County, Pennsylvania, as a result of the inhalation of toxic fumes from a defective kerosene heater manufactured by defendant, The Tilley Lamp Company, Ltd. (Tilley). At the time of this occurrence, Tilley was covered by a liability insurance policy issued by garnishee, Eagle Star, a company registered to do business in the Commonwealth of Pennsylvania.

Plaintiff's complaint against Tilley was filed September 18, 1968. Service of the complaint was made upon Tilley on September 24, 1968. On October 4, 1968, Eagle Star received notice. Eagle Star, however, failed to enter an appearance, contact plaintiff's counsel, or in any other manner participate in this litigation. A default was entered December 12, 1968 against Tilley for failure to file an answer or plead. A non-jury trial on the aforesaid claims was held January 6, 1969, before the undersigned District Judge, and judgments were entered June 30, 1969, and October 1, 1969.

Plaintiff's counsel, unaware of Tilley's insurance coverage, initiated an investigation to determine the existence of possible assets of the defendant. Although Attachment Execution was filed in this court naming the local distributor of Tilley products as garnishee and Attachment Execution proceedings were filed in the Court of Common Pleas, Cuyahoga County, Ohio, naming local distributors in the Cleveland area as garnishees no assets were found. In the course of their investigation, plaintiff's counsel dis-

covered evidence of insurance and the probable identity of the insurance carrier by securing a copy of answers to interrogatories filed by Tilley in an action filed in the U. S. District Court for the Middle District of Florida.

On April 21, 1971, plaintiff's counsel filed a praecipe for writ of attachment execution naming Eagle Star as garnishee and also filed interrogatories in attachment directed to the garnishee. The interrogatories were endorsed with a notice to answer within twenty (20) days from the date of service, according to the applicable Rule of court. Service of the Writ of Execution and Interrogatories was made upon the Insurance Commissioner of Pennsylvania, agent for the garnishee, on April 22, 1971, and a copy was received by certified mail by Eagle Star at its United States Office, 75 Maiden Lane, New York, New York on April 23, 1971. On April 26, 1971, Eagle Star wrote an inquiry to plaintiff's counsel concerning the matter. On April 29, 1971, plaintiff's counsel answered the inquiry, setting forth *inter alia* Eagle Star's policy number and the dates of coverage. Eagle Star made no further attempt to contact plaintiff's counsel.

Although the twenty (20) day time limitation for answering interrogatories in attachment expired May 13, 1971, plaintiff did not enter a default until June 4, 1971, forty-three (43) days after service. On June 10, 1971, garnishee filed its motion to vacate this judgment pursuant to Rules 55 (c) and 60 (b) of the Federal Rules of Civil Procedure.

A motion to vacate a default judgment is an appeal to the equitable powers of the court. The criteria to be con-

sidered by this court are: (1) Was the default caused by excusable neglect on the part of the garnishee? (2) Did counsel for defendant act promptly and diligently in filing the motion upon learning of the entry of the default judgment? and (3) Has garnishee set forth a potential meritorious defense to plaintiff's action? *Nicholson v. Allied Chemical Corp.*, 200 F. Supp. 206 (E. D. Pa. 1961).

The court recognizes the general principle that motions to vacate default judgments must be liberally interpreted, and matters involving large sums should ordinarily not be determined on judgment by default if it can be reasonably avoided. However, in the instant case, this court finds that Eagle Star has failed to justify the vacating of the default judgment entered.

Of the three requisites above set forth to establish good cause for the vacating of a default judgment Eagle Star has met only the second. Counsel for the garnishee has, in fact, acted with promptness and diligence in filing the instant motion upon learning of the default.

The acts and omissions of Eagle Star, however, from the very beginning of the case, have demonstrated a conscious disregard for the process of this court. Since October 4, 1968, when Eagle Star received notice of this claim and long prior to the entry of a default judgment against its insured, the carrier had ample time to engage in whatever discovery was indicated, contact plaintiff's counsel, participate in and/or control the defense to the principal action, and otherwise protect its interests under the terms of its policy, but chose not to do so. The same evasive attitude is reflected in Eagle Star's failure, when joined as garni-

shee in the attachment execution proceedings, in the face of actual notice, to refer this matter to counsel until a date subsequent to May 13, 1971, the expiration date of the time allotted to answer interrogatories in attachment. Such unexplained disregard for legal process does not constitute excusable neglect.

Furthermore, Eagle Star has failed to set forth a substantive defense on which it would be likely to prevail if the default judgment were vacated. The two basic defenses set forth by Eagle Star are: (1) Lack of notice, and (2) Absence of coverage. This court is of the opinion that under the circumstances Eagle Star had been afforded reasonable notice. There is no indication in the record that Tilley had any notice of the accident prior to service of the complaint upon it, and Eagle Star received notice of suit within ten (10) days of service of the complaint upon its insured. Anent the absence-of-coverage issue, Memorandum No. 2 of the insurance contract between Eagle Star and Tilley reads as follows:

> IT IS HEREBY UNDERSTOOD AND AGREED notwithstanding anything herein contained to the contrary, that the indemnity provided by this Policy is extended to apply to the sale overseas of products manufactured and/or sold by the Insured.
>
> PROVIDED ALWAYS THAT:—
>
> (b) all claims arising by reason of this extension shall be dealt within the jurisdiction of the United Kingdom Courts only. . . .*

* Although the term "indemnity" is employed in this Memorandum, upon a review of the terms and provisions of the policy, the court interprets the same as a liability contract and not an indemnity contract.

The court viewed Clause (b) under Memorandum No. 2 above set forth, upon which garnishee relies to exclude coverage, as ambiguous, and, being part of an insurance contract, a contract of adhesion, which must be interpreted most strongly against the insurer, the clause does not necessarily refer to claims instituted by anyone not an immediate party to the insurance contract. The plaintiff herein not being an immediate party to the contract is not relegated to the courts of the United Kingdom under the terms of the policy. On the other hand, although it is recognized that, as a general rule, the rights of a judgment creditor rise no higher than those of the insured against the insurer garnishee, nevertheless, a procedural requirement in a contract of insurance that an injured resident of the Commonwealth of Pennsylvania must present his claim to a court of the United Kingdom is unreasonably restrictive and contrary to the Act of 1921, May 7, 1921, of the Commonwealth of Pennsylvania, P. L. 682, Article III, § 301, 40 P. S. § 421, "which deals with the requisites for foreign insurance companies to do business in the State, and the Act of 1921, May 17, P. L. 789, Article II, § 210, as amended, 40 P. S. § 48, relating to service of process upon the Insurance Commissioner." *Consolidated Sun Ray, Inc. v. Steel Insurance Company,* 190 F. Supp. 171 (E. D. Pa. 1961). Neither the coverage of the accident giving rise to plaintiff's claim nor his right of garnishment is barred by a contractual arrangement which is inconsistent with controlling statutory law.

Now, therefore, the motion of Eagle Star Insurance Company, Ltd., garnishee, to vacate judgment entered against said garnishee on June 4, 1971, for failure to answer interrogatories in attachment is hereby dismissed.

It is further ordered that the Order of Court dated June 14, 1971, restraining plaintiff from executing upon the said judgment be and the same is hereby vacated.

HERBERT P. SORG, *D. J*

Dated: July 8, 1971.

cc: Jerry B. Landis, Esquire
2004 Lawyers Bldg., Pgh., Pa. 15219

Weis & Weis, Esquires
920 Grant Bldg., Pgh., Pa. 15219

Robert A. Cohen, Esquire
1008 Law & Finance Bldg., Pgh., Pa. 15219

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Supreme Court, U. S.
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AUG 10 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-110

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EAGLE STAR INSURANCE GROUP, Garnishee,
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THE TILLEY LAMP COMPANY, LIMITED, a corporation; THE TILLEY LAMP CO. (U. S. A.) LTD., a corporation; and A. W. THACKER, INC., a corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT A. COHEN,
JERRY B. LANDIS,
2004 Lawyers Bldg.,
Pittsburgh, Pa. 15219,
Attorneys for Respondents—Walker and Flavin.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE.
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881-7483.

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-110

EAGLE STAR INSURANCE GROUP, Garnishee,
Petitioner,

v.

CARL N. WALKER, Administrator of the Estate of Norbert N. Walker, deceased,
and
THE TILLEY LAMP COMPANY, LIMITED, a corporation; THE TILLEY LAMP CO. (U. S. A.) LTD., a corporation; and A. W. THACKER, INC., a corporation,
Respondents.

EAGLE STAR INSURANCE GROUP, Garnishee,
Petitioner,

v.

MARY C. FLAVIN, Administratrix of the Estate of Wilbert F. Gries, deceased,
and
THE TILLEY LAMP COMPANY, LIMITED, a corporation; THE TILLEY LAMP CO. (U. S. A.) LTD., a corporation; and A. W. THACKER, INC., a corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counter-Statement of Question Presented

Should the Supreme Court of the United States issue a writ of certiorari where the Court of Appeals for the Third Circuit has upon review of the record found that the District Court has not acted arbitrarily or unfairly in refusing to vacate a default judgment?

Counter-Statement of the Case

Norbert N. Walker and Wilbert F. Gries, both citizens of Pennsylvania, died October 1, 1967 in McKean County, Pennsylvania as a result of inhalation of toxic fumes from a defective kerosene heater manufactured by The Tilley Lamp Company, Ltd. At the time of this occurrence Tilley Lamp Company was covered by a liability insurance policy issued by Eagle Star Insurance Group, a company registered to do business in Pennsylvania. The kerosene heater had been purchased in Pennsylvania by Wilbert F. Gries.

Complaints against Tilley Lamp Company were filed September 18, 1968. Service of the Complaints was made upon Tilley Lamp September 24, 1968. Eagle Star was notified of the suit October 4, 1968. Eagle Star, however, failed to enter an appearance, contact counsel for decedents' estates or in any other manner participate in the litigation. Defaults were entered December 12, 1968, against Tilley Lamp Company for failure to file Answers or otherwise plead. A non-jury trial on damages was held January 6, 1969, and judgments were subsequently entered.

Subsequent to the entry of judgment against Tilley Lamp counsel for decedents' estates discovered evidence of insurance and the probable identity of the insurance carrier by securing a copy of Answers to Interrogatories filed by Tilley Lamp in an action in The United States District Court for the Middle District of Florida.

On April 21, 1971, counsel for decedents' estates filed Praecipes for Writ of Attachment Execution, naming Eagle Star as garnishee, and also filed Interrogatories in Attachment directed to the garnishee. The Interrogatories were endorsed with notices to answer within twenty (20) days from the date of service, according to the applicable Rule

of Court. Service of the Writs of Execution and Interrogatories was made upon the Insurance Commissioner of Pennsylvania, statutory agent for the garnishee, on April 22, 1971, and copies were received by certified mail by Eagle Star at its United States Office, 75 Maiden Lane, New York, New York, on April 23, 1971.

On April 26, 1971 Eagle Star wrote an inquiry to counsel for decedents' estates concerning the matter. Counsel's reply of April 29, 1971, did not merely refer Eagle Star to the Answers to Interrogatories filed in The United States District Court for the Middle District of Florida, but included a copy of both the Interrogatories and Answers thereto. This provided Eagle Star with *specific* information as to identity of the insured, the Policy Number, and the effective dates of coverage. In spite of this information, Eagle Star failed to file Answers to Interrogatories and made no further attempt to contact counsel.

Although the twenty-(20)-day time limitation for answering Interrogatories in Attachment expired May 13, 1971, default judgments were not entered until June 4, 1971, forty-three (43) days after service. On June 10, 1971, Eagle Star filed its Motions to Vacate Judgment pursuant to Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure.

A hearing on the Motions to Vacate Judgment was held before the Honorable Herbert P. Sorg, District Judge of the United States District Court for the Western District of Pennsylvania. The Motions to Vacate Judgment were denied and Eagle Star appealed to the United States Court of Appeals for the Third Circuit. After review of briefs and oral argument, the Circuit Court of Appeals affirmed judgment of the District Court in a *per curiam* opinion.

ARGUMENT

Petitioner has failed to set forth grounds for the issuance of a Writ of Certiorari. The central issue in this matter is the exercise of sound discretion by the District Judge in denying petitioner's Motion to Vacate default judgments entered against petitioner. Federal Courts in all of the Circuits agree that a Motion to Vacate a judgment is addressed to the sound discretion of the District Judge and his determination will not be disturbed upon appeal except for an abuse of discretion. *Gomes v. Williams,* 420 F. 2d 1364 (10th Cir., 1970); *Madsen v. Burub,* 419 F. 2d 4 (9th Cir., 1969); *Aviation Specialties, Inc. v. Thompson,* 395 F. 2d 199 (9th Cir., 1968); *Parker v. Broadcast Music, Inc.,* 289 F. 2d 313 (2d Cir., 1961); *Hughes v. Holland,* 320 F. 2d 781 (D. C. Cir., 1963).

In the instant case the District Judge and the Circuit Judges stated their recognition of the principle that the Rules covering Motions to Vacate Default Judgments must be liberally interpreted. Even allowing for liberality of interpretation, however, the District Judge found that the acts and omissions of Eagle Star from the very beginning of the case demonstrated a conscious disregard for legal process and that such unexplained disregard for legal process does not constitute excusable neglect.

The District Judge further found that Eagle Star had not set forth a meritorious defense.

In reviewing the District Judge's opinion, the Circuit Court of Appeals stated:

> "However, on the present record we cannot say that the District Court acted arbitrarily or unfairly in refusing to Vacate the Default."

In order to create an issue of sufficient interest to warrant review by this Court Counsel for petitioner have attempted to review defenses already ruled upon by the District Court and affirmed by the Court of Appeals and have attempted to compare this case with two cases previously decided by this Court.

Home Insurance Company v. Dick, 281 U. S. 397 (1929), and *Lauritzen v. Larsen,* 345 U. S. 571 (1953), cited by petitioner, are clearly distinguishable from the instant case. Both cited cases involved conflict-of-laws questions wherein the forum state attempted to apply its own laws to a case, even though the forum state's connection with both the parties and the cause of action was extremely remote and tenuous. In the instant case no conflict-of-laws question is presented, and the forum state's connection with the parties and the cause of action is direct and meaningful. In the instant case both decedents were citizens of Pennsylvania; the cause of action arose in Pennsylvania; decedents both died in Pennsylvania; the insurance contract by its terms was intended to cover products sold in Pennsylvania; decedent, Wilbert F. Gries, purchased the Tilley Lamp in Pennsylvania; defendant, The Tilley Lamp Company, Ltd., does business in Pennsylvania; and the garnishee-petitioner, Eagle Star, is registered to do business in Pennsylvania. The District Court has properly found that to require an injured resident of Pennsylvania to present his claim to a Court in the United Kingdom in order to obtain practical redress for his injuries is unreasonably restrictive and contrary to the public policy of Pennsylvania.

It may be further noted that because of the avoidance tactics of both Eagle Star, and Tilley Lamp Company, counsel for decedents' estates never learned of the insurance policy involved and its provisions, until after the statute of limitations had run in the United Kingdom.

Petitioner's design defects exclusion defense is entirely without merit. Contrary to petitioner's argument, the District Court did not make a finding of fact that a design defect existed. In entering judgment after a default, the Court states Tilley Lamp's liability in the alternative. In the Walker case the Court states findings as follows:

> "3. On or about October 1, 1967, Norbert N. Walker died as a result of inhalation of toxic fumes from a defective kerosene lantern manufactured and sold by the defendants. The said lantern was negligently designed *and/or* negligently manufactured." (Emphasis supplied.)

In the Gries case, the Court stated:

> "3. On or about October 1, 1967, Wilbert F. Gries died as the result of inhalation of toxic fumes of a kerosene lantern manufactured and sold by defendants."

In the Walker case, the District Court made other specific findings of liability upon the part of Tilley Lamp which are not covered by the design defects exclusion.

Eagle Star's Motion to Vacate Judgment and the amendments thereto disclose no averments or offer of proof that a design defect existed in the Tilley Lamp which caused the death of Norbert N. Walker and Wilbert F. Gries.

Petitioner's satisfaction and settlement defense is also without merit. Pennsylvania Supreme Court cases subsequent to *Thompson v. Fox,* 326 Pa. 209, 92 A. 107 (1937) cited by Petition, clearly state that the release of one not shown to be jointly liable does not release a tortfeasor. The settlements between decedents' estates and D. Lux Sales, Inc. were compromise settlements in each case for less than one-half the actual damages. D. Lux Sales, Inc. was neither an admitted nor an adjudged tortfeasor. Furthermore, petitioner's own statement agrees that D. Lux was not a joint tortfeasor with Tilley Lamp.

In *Koller v. Pennsylvania Railroad Company*, 351 Pa. 60, 40 A. 2d 89 (1944), the Pennsylvania Supreme Court states at 351 Pa. 63:

> "Since there was no community of fault, there was no joint tort. In a situation such as this, the law is equally clear that a release of one *not shown* to be liable does not release a tortfeasor." (Emphasis supplied.)

In *Wilbert v. Pittsburgh Consolidation Coal Company*, 385 Pa. 149, 122 A. 2d 406, 407 (1956), the court stated:

> "As the release was executed and delivered prior to the effective date of the Uniform Contribution Among Joint Tortfeasors Act of July 19, 1951, P. L. 1130, 12 P. S. §§ 2082-2089, the common-law rule that a release of one joint tortfeasor is a release of all would have been applicable. See *Thompson v. Fox*, 326 Pa. 209, 212, 213, 192 A. 107, 112 A. L. R. 550, and cases there cited. However, in order that a release of one person from liability may bar an action against another for the same injury, the two must have been *jointly liable*. Accordingly, a release of one who is not legally liable for an injury to another does not operate to release the culpable tortfeasor." (Emphasis supplied.)

Conclusion

Petitioner has failed to set forth a valid reason for the issuance of a Writ of Certioari to review the judgment of the Court of Appeals The petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. COHEN,
JERRY B. LANDIS,
Attorneys for Respondents—
Walker and Flavin.

Dated: August 9, 1972.